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August 23, 2000

David Boergers
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: **TransÉnergie U.S. Ltd.; Docket No. ER00-1-000**
Report on Results of Open Season

Dear Secretary Boergers:

Pursuant to the Commission's Order issued June 1, 2000, *TransÉnergie U.S. Ltd.*, 91 FERC ¶ 61,230 (2000), (the "Order"), TransÉnergie U.S. Ltd.'s ("TEUS") submits its Report on the Open Season for the Cross Sound Cable ("CSC") Interconnector ("Report"). The original Report, boldly indicating on the front page "Contains Privileged Information Do Not Release" is enclosed as Attachment 1 hereto. Also enclosed are fourteen copies of the document without the information for which the privileged treatment is sought as Attachment 2 hereto. Pursuant to Section 388.112 of the Commission's regulations, 18 C.F.R. § 388.112 (1999), TEUS requests privileged treatment for the redacted portions of the Report. The following is the justification for this request.

Request for Confidential Treatment of Report

Section 388.112 of the Commission's regulations (18 C.F.R. § 388.112) provides that "[a]ny person submitting a document to the Commission may request privileged treatment by claiming that some or all of the information contained in a particular document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act ["FOIA"], 5 U.S.C. 552 *et seq.*, and should otherwise be withheld from public disclosure." TEUS submits that the redacted portions of the enclosed Report meet the standards of Section 388.112.

Sub-section (b)(4) of the first section of FOIA (5 U.S.C. 552(b)(4)) provides an exception for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." In order to bring the matter within FOIA's commercial or financial exemption, it must be shown that the information is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential.

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National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). When information is sought under FOIA, commercial or financial information is deemed confidential if disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. *McDonnell Douglas Corp. v. National Aeronautics and Space Admin.*, 895 F. Supp. 316 (D.D.C. 1995). Parties do not need to show actual competitive harm, only evidence revealing actual competition and the likelihood of substantial competitive harm. *GC Micro Corp., v. Defense Logistics Agency*, 33 F.3d 1109 (9th Cir. 1994); *Gulf and Western Industries, Inc. v. U.S.*, 615 F.2d 527 (D.C. Cir. 1979).

In the instant case, the information TEUS is seeking to have exempted from FOIA requirements concerns the results of Tranche 1 of the open season held for the CSC Interconnector capacity. Thus, the information sought to be kept confidential is commercial information that is obtained from TEUS (a "person"), related to "actual competition" (*i.e.*, the open season bidding) for CSC capacity, and, as shown below, its disclosure is likely to cause substantial competitive harm to TEUS. This information should be kept confidential because release of the detailed results of Tranche 1 could substantially alter the success of Tranche 2, which would likely cause substantial competitive harm to TEUS. If a Tranche 2 respondent has access to the redacted information provided in this Report, it could affect the competitive posture of such respondent in Tranche 2. Thus, if a Tranche 2 respondent had access to information on, for example, (i) how many Tranche 1 respondents there were, (ii) the total capacity requested by unsuccessful Tranche 1 respondents, (iii) the specific reasons why those specific respondents were not selected, or (iv) the methodology by which the successful respondents were chosen, that Tranche 2 respondent would have a competitive advantage that could affect the nature of the responses to Tranche 2 and cause substantial competitive harm to TEUS.

Courts and agencies perform a balancing test to weigh the respective interests of the party fighting disclosure and the overall interest of the public in disclosure. *Washington Post Co. v. U.S. Dept. of Health and Human Services*, 865 F.2d 320 (D.C. Cir. 1989). In ruling whether to grant an exemption from disclosure, a federal agency considers whether disclosure would significantly aid the agency in fulfilling its functions, harm the public generally, and whether there exist any alternatives to disclosure that would provide consumers with adequate knowledge while at the same time protecting the producers' interests. *Pennzoil v. Federal Power Commission*, 534 F.2d 627 (D.C. Cir. 1976).

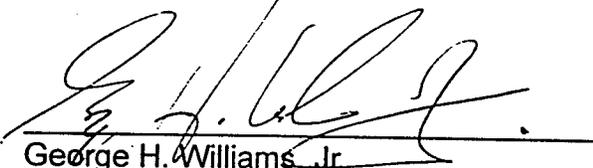
The Commission has consistently provided confidential treatment upon a showing that the disclosure of commercial or proprietary information could harm the proponent. See, *e.g.*, *Texas Gas Transmission Corp.*, 66 FERC ¶61,333 (1994) (Commission granted a protective order allowing confidential treatment for Texas Gas' gas purchase contracts); *Mississippi River Transmission Corp.*, 69 FERC ¶61,075

(1994); *Arkla Energy Resources*, 46 FERC ¶ 61, 415 (1989). On these occasions, the Commission concluded that its functions would not be impaired, and that the public would not be harmed by the confidentiality. This is a similar situation. As explained above, disclosure will harm TEUS, whereas confidential or privileged treatment will not affect the Commission's regulatory process.

As shown above, disclosure of the redacted information, reflecting results of an open season competitive bidding process, would be improper because TEUS can show "actual competition" and a likelihood of substantial competitive harm. Accordingly, TEUS respectfully requests that the redacted portions of the enclosed Report be given confidential treatment in accordance with 18 C.F.R. § 388.112.

Respectfully submitted,

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I. INTRODUCTION AND EXECUTIVE SUMMARY

A. *Summary of This Filing*

By order issued June 1, 2000, *TransÉnergie U.S. Ltd.*, 91 FERC ¶ 61,230 (2000), (“June 1 Order”), the Federal Energy Regulatory Commission (“Commission”) approved, subject to certain conditions, a request by TransÉnergie U.S. Ltd. (“TEUS”) for blanket authority to make sales, on a negotiated basis, of firm transmission capacity over the Cross Sound Cable (“CSC”) Interconnector. The Commission’s conditions included requiring TEUS to conduct an Open Season for the initial allocation of firm transmission rights on the CSC Interconnector. *June 1 Order, 91 FERC at 61,839*. The June 1 Order also required TEUS to file its proposed open season procedures with the Commission. *Id.* Furthermore, the Commission required TEUS to

report on the results of its open season 30 days after its close. The report should include the identity of the parties that purchase capacity, the amount and term of the reserved capacity as well as the prices established under the auction. The report should also indicate how many parties requested capacity but did not receive it, the amount of capacity requested, the reason that they were not awarded firm transmission, and the reason [TEUS] declined to expand the line to accommodate these requests.

Id.

On June 9, 2000, TEUS filed with the Commission a detailed proposal describing the process for the CSC Interconnector’s open season. TEUS’s June 9 filing proposed to conduct the open season in two phases. By order issued June 30, 2000, the Commission accepted TEUS’s June 9 filing, *TransÉnergie U.S. Ltd.*, 91 FERC ¶ 61,347 (2000), (“June 30 Order”). The June 30 Order noted that TEUS

has agreed to disclose the basis for selecting the successful bidder(s) and the selection rationale in its post-open season report, which will also allow us to monitor how the selection criteria have been applied. As [TEUS] notes, this will permit the Commission to determine that the open season did not favor any party over another.

91 FERC at 62,168 (footnote omitted).

This Post-Open Season Report (“Report”) is filed in compliance with the Commission’s directives in the referenced orders.¹ As directed by the June 1 Order, Section IV of this Report “identifies the parties that purchase capacity, [and] the amount and terms of the reserved capacity.” See *June 1 Order*, 91 FERC at 61,839. And Section V “indicate[s] how many parties requested capacity but did not receive it, the amount of capacity requested, the reason that they were not awarded firm transmission, and the reason [TEUS] declined to expand the line to accommodate these requests.” See *June 1 Order*, 91 FERC at 61,839. Moreover, as TEUS offered in its June 9 filing, Sections III and V disclose the “basis for selecting the successful bidder(s) and the selection rationale” used by TEUS. (See *June 30 Order*, 91 FERC at 62,168.)

B. Summary of Results of Open Season

The CSC Interconnector’s open season has been an overwhelming success. The market demand for firm transmission on the CSC Interconnector (as measured by the cumulative capacity requested by respondents to the Open Season process) greatly exceeded the physical capacity of the facility.

¹ As discussed below, TEUS extended the deadline for responses to the open season by an additional week to July 24, 2000. TEUS is thus filing this report within 30 days of the extended close of the open season, as required by the Commission.

As a result of this positive market response, TEUS was not only able to execute financially binding agreements with the selected respondent (LIPA,² as discussed below), but also to commence discussions with other respondents regarding a prompt expansion of the project. This Report provides more information on this successful Tranche 1 process and its outcome, and TEUS' intention to promptly conduct a Tranche 2 open season.

Most importantly, the market response to the open season process has confirmed the Commission's approved framework for merchant transmission development as a valid, efficient and feasible method for building new transmission facilities. The construction of these facilities will not result in any increase to any mandatory grid access charge. The Commission recognized TEUS' proposal as innovative and evidence of transmission as a stand-alone business. The tremendous success of the open season has produced a financeable transmission project that is scheduled to be in-service by May 2002. This success confirms the ability of the market to respond to the locational pricing signals in place in PJM, New York and (shortly) New England.

LIPA submitted the best Tranche 1 proposal that fully conformed with all of the Threshold Criteria specified by TEUS and approved by the Commission in its June 30 Order. After careful review of LIPA's proposal and subsequent negotiations, TEUS concluded that the proposed agreement between LIPA and TEUS provided an acceptable allocation of financial risk between the parties. As a result, TEUS selected

² The legal name on LIPA's proposal was the Long Island Lighting Company, d/b/a LIPA.

LIPA as the successful respondent for the full capacity of Tranche 1. On August 2, 2000, TEUS and LIPA executed financially binding agreements under which LIPA will purchase rights to the full capacity (approximately 330 megawatts) of the first phase of the CSC Interconnector. The minimum term of this agreement is more than 10 years.

Accordingly, the first phase of the CSC Interconnector is fully subscribed. As TEUS contemplated in its June 9, 2000 Pre-Open Season Filing, the full subscription of the Tranche 1 capacity eliminates the need for an auction of unsubscribed capacity. Thus, TEUS will not be conducting such an auction for any capacity on the first phase of the CSC Interconnector. Since there was no auction there are no "prices established under the auction" to report. *See 91 FERC at 61,839.*

In the Tranche 1 Open Season Process, other entities submitted proposals to purchase firm transmission rights on the CSC Interconnector. In total, these other Tranche 1 proposals requested transmission capacity of over 1000 MW, or more than 3 times the capacity available in the Tranche 1 Open Season. None of these other proposals met all of the Threshold Criteria established by TEUS for Tranche 1. Nonetheless, some of the proposals expressed strong interest in obtaining rights to transmission capacity between New England and Long Island. TEUS has decided that those expressions of interest support its prompt commencement of the Tranche 2 open season, as previously described to the Commission by TEUS in its June 9 filing and accepted in the Commission's June 30 Order. As a result, it is possible that some of the requests that could not be accommodated in Tranche 1 might be accommodated in Tranche 2.

II. OPEN SEASON PROCESS

A. Chronology

As contemplated in the Commission's June 30 Order, TEUS commenced its Tranche 1 open season on July 3, 2000. Initial publicity for the open season, however, began in earnest on Wednesday June 28, 2000, immediately following the Commission's open meeting in which the June 30 Order was approved. On that day, TEUS sent e-mail messages to all NEPOOL and NYISO market participants announcing the open season, its schedule, and TEUS' schedule for informational seminars in New York City and Boston to discuss the project and the open season. The message also included a link to the CSC Interconnector's web site, www.crosssoundcable.com, which had been activated earlier that week.

An extensive number of documents and other information were posted on the web site and available to the public by Wednesday, June 28, 2000. In addition, the form of Confidentiality and Open Season Process Agreement was posted on July 3, 2000. On the web site, interested persons could subscribe to an e-mail alert service through which they would receive an e-mail message whenever the web site was updated. The web site also invited persons interested in attending the New York and Boston informational seminars to register via e-mail. The web site further included a toll-free telephone number for any inquiries regarding the project, and further background information on the project (e.g., electronic versions of TEUS' filings with the Commission).

On Thursday, July 6, 2000, TEUS held the first of its open season seminars in New York City. Representatives from eight entities attended. TEUS arranged for a

stenographer to transcribe this meeting, and the transcript was posted on the web site on July 10, 2000. During this meeting, TEUS gave a summary presentation on the project and the open season process, and responded to many questions from the audience.

On Monday, July 10, 2000, TEUS held its second open season seminar in Boston, Massachusetts. Representatives from seven entities attended. TEUS was unable to arrange for a stenographer for this meeting. At the Boston meeting, TEUS gave the same presentation as in the New York meeting and also answered questions from attendees.

During the Boston meeting, several attendees requested an extension of the deadline for responses to the open season. TEUS decided to grant this extension and on Tuesday morning, July 11, 2000, TEUS informed all subscribers to the e-mail alert service that the deadline for responses had been extended an additional week until 5:00 pm EDT Monday, July 24, 2000 (instead of Monday, July 17, 2000). Also on July 11, TEUS posted the revised open season deadline on the CSC Interconnector web site.

On Tuesday, July 11, an entity that had not participated in either of the open season seminars requested to meet with TEUS to discuss the project. TEUS agreed and held a meeting with this entity on Monday July 17 at TEUS' offices. During this meeting, TEUS gave the same presentation as in the New York and Boston meetings.

During the two weeks between July 10 and July 24, TEUS received several telephone and e-mail inquiries about the project and the open season. Also during this period, TEUS engaged in negotiations with several entities regarding the substance of the Confidentiality and Open Season Process Agreements, ultimately executing

agreements with eight entities. Immediately upon receipt of an executed agreement, TEUS sent each of these entities a numbered Confidential Information Package, which included the proposed Transmission Rights Purchase Agreement. Also during this two-week period, TEUS responded to inquiries regarding information in the Confidential Information Packages, including questions regarding possible modifications to the draft Transmission Right Purchase Agreement.

By the Open Season deadline on Monday, July 24, 2000, TEUS had received a total of six responses to the open season. TEUS began the process of reviewing these proposals immediately upon receipt and requested clarifications from some of the respondents regarding portions of their proposals that were uncertain. Only one response (the response from LIPA) was a Fully Conforming Proposal, i.e. a proposal that met all of TEUS' required Threshold Criteria as accepted in the Commission's June 30 Order. Each of the other five responses was contingent on further corporate, management, or board approvals and so were unable to execute a financially binding agreement in early August 2000 in order to meet TEUS' project schedule.

TEUS then immediately began negotiations with LIPA to explore mutually beneficial modifications to the original proposal. TEUS and LIPA executed a financially binding agreement on August 2, 2000.

On August 2, 2000, TEUS notified selected respondents that, while their proposals had not been met all of the Threshold Criteria and thus had not been further considered, TEUS had determined that their proposals were potentially sufficiently attractive to warrant exploratory discussions regarding their interest in a Tranche 2 open season. TEUS invited those selected respondents to consider non-binding negotiations

regarding Tranche 2. On August 4, 2000, TEUS notified all other respondents that their proposals had not been selected pursuant to the open season.

B. Web Site Contents

The CSC Interconnector web site included, among other things, links to the following documents related to the project in general.

- *Project Fact Sheet*

A brief fact sheet summarizing the salient features of the CSC Interconnector.

- *Technical Description of Facilities*

A more detailed, technical description of the technology, equipment, and facilities of the CSC Interconnector.

- *Project Map*

A map of the facilities showing the interconnection points on Connecticut and Long Island as well as the route of the buried submarine cable.

- *New England Interconnection and System Impact Studies*

A link to various interconnection and system impact studies prepared by TEUS for the New England interconnection process.

- *NEPOOL Approval of Interconnection Request*

The motion approving TEUS' interconnection request as approved by the NEPOOL Participants Committee on February 4, 2000.

- *Market-Based Rate Filing*

A full copy of TEUS' October 1, 1999 filing before the Commission seeking market-based rate authority (Docket No. ER00-1-000).

- *Supplemental Filing*

March 21, 2000 supplemental filing made by TEUS in support of its October 1, 1999 filing in Docket ER00-1-000.

- *Commission Order Approving Proposal*

A link to the June 1 Order as contained on the Commission's RIMS web system.

- *Commission Press Release*

The Commission's May 31, 2000 press release regarding the Commission's approval of TEUS' proposal.

- *TEUS Press Release on FERC Approval*

TEUS' June 1, 2000 press release announcing the Commission's approval of TEUS' proposal.

- *Compliance Filing*

TEUS' July 3, 2000 compliance filing in Docket No. ER00-1-000 detailing procedures for implementing the Standards of Conduct required under Order No. 889; and providing detailed secondary market provisions, including procedures for the reassignment of firm transmission rights.

The CSC Interconnector web site also included links to the following documents related to the open season:

- *Instructions for Respondents*

Responses were due by 5:00 pm EDT July 24, 2000. TEUS indicated that no fax or e-mail submissions would be accepted. In addition, respondents were encouraged to execute a Confidentiality and Open Season Process Agreement in order to fully participate in the open season. Contact information was also provided.

- *Form of Confidentiality and Open Season Process Agreement*

This agreement, *inter alia*, ensured that each party maintained confidential information received from the other party as confidential and not for use by either party except in connection to the open season. The agreement also specifies for the destruction or return of all confidential materials by September 1, 2000.

- *Schedule for Open Season*

An up-to-date schedule for the open season process, including dates and times for the project seminars and deadlines for responses.

- *Summary Presentation on Open Season*

A presentation summarizing the project and the open season process. This presentation was made at both the New York City and Boston seminars.

- *Pre-Open Season FERC Filing*

TEUS' June 9, 2000 filing before the Commission detailing the open season schedule, process, and criteria to be used in reviewing proposals.

- *Commission Order Accepting Open Season Process and Criteria*

A link to the June 30 Order as contained on the Commission's RIMS web system.

- *Transcript of July 6, 2000 Open Season Seminar*

A full, unedited transcript from the New York open season seminar.

C. Selected Open Season Statistics

The following table presents selected statistics from the open season process:

Entities Expressing Interest in Participating in Open Season (via all channels)	16
E-Mail Addresses on Web Site Subscriber List	31
Entities Represented at Open Season Seminars	15
Attendees at Open Season Seminars	20
Entities That Executed Confidentiality Agreements	8
Entities That Submitted Responses	6
Entities That Submitted Proposals to Purchase Tranche 1 Rights	5
Entities That Submitted Fully Conforming Proposals	1

D. Selection Criteria

Listed below are the "Threshold Criteria" that were established for the Tranche 1 Open Season process. Tranche 1 proposals were required to meet all of the Threshold Criteria to be considered as Fully Conforming Proposals. Any Tranche 1 proposal that

did not meet all of the Threshold Criteria was not considered to be a Fully Conforming Proposal. The Threshold Criteria for the Tranche 1 Open Season process were:

- *Execution of Confidentiality and Open Season Process Agreement*

Allowed TEUS to insure that prospective respondents would treat certain information received from TEUS as confidential.

- *Eligible Customer*

Ensured that potential customers were eligible for wholesale transmission service.

- *Creditworthiness*

Ensured that respondents would meet commercial creditworthiness or credit support criteria

- *Proposal Not Contingent Upon Further Corporate, Management, or Board Approvals*

Measured the ability of potential respondents to execute a financially binding agreement in early August 2000 in order to meet TEUS' project schedule.

At the start of the Open Season process, TEUS did not know if any Fully Conforming Proposals would be received. Hence, potential respondents were allowed to submit "Non-Conforming Proposals," to allow TEUS to consider those proposals if no Fully Conforming Proposals were received.

As a Fully Conforming Proposal was received from LIPA (and not from any other respondent), and as LIPA's proposal was acceptable to TEUS, TEUS did not perform a comprehensive evaluation of the details of the remaining proposals.

III. THE SELECTED PROPOSAL

LIPA provided a timely proposal that completed all the necessary bidding forms. LIPA's proposal provided a certification that its proposal was not contingent on any further internal approvals. In addition, LIPA indicated that, upon acceptance of its

proposal, it would be able to execute a financially binding agreement by August 1, 2000. As such, LIPA's proposal met all of the required Threshold Criteria.

LIPA requested 100% of the Tranche 1 capacity (up to 330 megawatts) for a term of 20 years. LIPA also provided fully detailed comments on the proposed financial risk allocation terms, including a complete version of its proposed purchase agreement.

Once TEUS Have had determined that LIPA's proposal was a Fully Conforming Proposal, TEUS evaluated whether the proposal met TEUS's investment criteria, given the detailed financial risk allocation terms and conditions proposed by LIPA. Once TEUS determined that the LIPA proposal met TEUS's risk/reward investment criteria, TEUS selected LIPA as the winning proposal and immediately entered into negotiations to finalize a transmission rights purchase agreement.

Because all capacity was subscribed during the Tranche 1 open season process, no auction was conducted and no auction price was established.

IV. THE OTHER PROPOSALS

As mentioned above, TEUS received six responses to its open season. Of these six responses, five responses provided specific proposals for the purchase of transmission rights on Tranche 1 of the CSC Interconnector. The sixth response did not provide a bid for Tranche 1, but indicated that entity's willingness to participate in a negotiation should the Tranche 1 process fail to provide an outcome that met TEUS' objectives. Given the successful outcome of the Tranche 1 open season, TEUS did not conduct any further evaluation of that entity's response.

LIPA offered the only Fully Conforming Proposal in the Tranche 1 open season. The proposals from the other respondents varied in their level of conformity with the

specified Threshold Criteria, but all of these other proposals were contingent upon further internal management or board approvals prior to executing a financially binding agreement. Given the need to execute financially binding agreements by early August 2000, TEUS simply could not afford to relax the Threshold Criterion regarding internal approvals. Hence TEUS did not award transmission to these other respondents.

The same need for expedition meant that TEUS could not expand the first phase of the CSC Interconnector to accommodate requests for expansion.

The overall market interest in the project was very high. The total capacity requested in the five proposals was over 1000 MW – more than three times the capacity of the project. Furthermore, most of the proposals were for relatively long terms (10 or more years). This combination of high market demand and potentially financeable commitments by other respondents motivated TEUS' decision to pursue an accelerated Tranche 2 process.

Once TEUS became more fully aware of the high market interest in transmission capacity between New England and Long Island, TEUS evaluated each of these non-conforming proposals on their merits to identify the entities that might be best placed to participate in discussions regarding a Tranche 2 open season process as discussed later. TEUS has contacted a subset of the other five respondents regarding their interest in a Tranche 2 open season.

V. SUMMARY OF RESULTS AND PROPOSAL FOR TRANCHE 2

The best Fully Conforming Proposal was submitted by LIPA, and that proposal met TEUS's risk/reward investment criteria. Hence, TEUS selected LIPA's proposal and quickly finalized a transmission capacity purchase agreement for all of the capacity

requested by LIPA (100% of the Tranche 1 capacity for more than 10 years). The execution of that agreement completed the Tranche 1 open season process, and this Report concludes the final reporting requirements to the Commission regarding that process.

However, the overall market response received by TEUS to its Tranche 1 Open Season process demonstrated significant market demand for additional transmission capacity between New York and New England. Accordingly, TEUS is anticipating a prompt commencement of the Tranche 2 Open Season process. Over the next few weeks, TEUS will be exploring the market interest in the Tranche 2 Open Season process and discussing the schedule for such an Open Season. TEUS will proceed with Tranche 2 using its same open season process as is outlined in its June 9 filing.